(3) CP 1/05

IN THE HIGH COURT OF JUDICATURE AT BILASPUR, CHHATTISGARH

WRIT PETITION No. 774 OF 2004

PETITIONER

Smt. Prem Kumari Sahu, aged about 69 years, Wife of Kanhaiyalal Sahu, Terminated Dai (Trained Mid Wife), Government Ayurvedic Dispensary, Bheji, Tehsil & Dist. Dantewada (Chhattisgarh)

758/04
R.R. No. .....
Presented by Shri Sameer Dehan
on 29/3/04

Versus

RESPONDENTS

1. State of Chhattisgarh through the Secretary, Department of Indian System of Medicine and Homeopathy, D. K. S. Bhawan, Mantralaya,Raipur (Chhattisgarh)

RECEIVED COPY
9.3.04
Clerk to A. G. Bilaspur

2. Director, Directorate of Indian System of Medicine & Homeopathy, Raipur, District Raipur (Chhattisgarh)

3. The Collector, Dantewada Dist. Dantewada (Chhattisgarh)

4. District Ayurved Officer, South Bastar,Dantewada (Chhattisgarh)

WRIT PETITION UNDER ARTICLE 226/227 OF THE CONSTITUTION OF INDIA

HIGH COURT OF JUDICATURE AT BILASPUR (C.G)

Writ Petition No. 774 of 2004

Smt. Prem Kumari Sahu

-Vs-

State pf Chhattisgarh and others

Sd/-
Sunil Kumar Sinha
Judge

I agree

Sd/-
Acting Chief Justice

Post for 11.03.2005

Sd/-
Fakhruddin
Judge

10.03.2005

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HIGH COURT OF JUDICATURE AT BILASPUR (C.G)

Writ Petition No. 774 of 2004

Smt. Prem Kumari Sahu

-Vs-

State of Chhattisgarh and others

DB: Hon'ble Shri Justice Fakhruddin, Ag.C.J. &
Hon'ble Shri Justice Sunil Kumar Sinha, J

Shri B.D.Guru, counsel for the Petitioner.

Shri V.V.S.Murthy, Deputy Advocate General for the State.

Smt.Meera jaiswal, Advocate appears as Amicus Curiae.

ORDER
(ll .03.2005)

As per Sunil Kumar Sinha, J

The petitioner who was working as a Trained Midwife in Government Ayurvedic Hospital Dispensary at Bheji, Konta Tahsil and District Dantewara (C.G), initially filed this petition challenging the order of termination dated 22.10.2003 (Annexure P-1) passed by respondent no.4. Later on, by way of amendment dated 18.2.2005 she also challenged the validity of the order dated

03.01.2001 *(Annexure P-4)* by which the period from 07.1.1989 to 08.01.1990 has been declared as *dies non* by the respondents.

(2) The brief facts of the case are as follows :-

The matter starts with the filing of an original application before State Administrative Tribunal, Jabalpur bearing O.A.No.2420/90. This application was filed by the petitioner claiming payment of her salary from February 1989 to February 1990 (13 months). The State opposed this application and submitted before the Tribunal that the petitioner was not entitled to salary as she was absent from the duty during the relevant period. Since the petitioner had claimed in her petition and rejoinder that she was through out present on duty, ultimately, the learned tribunal passed the order dated 17.08.1999 (Annexure P-3) saying that it is not possible for the tribunal to decide the factual dispute whether or not the petitioner was absent from duty during the relevant period. It was contended by the tribunal that the petitioner is not a daily wage worker and her salary cannot be withheld on a long term basis merely on the ground of the absence. It has been further contended that if an employee who is not on daily wages, is absent, then it has to be proved against him that he was absent. If the employee disputes the fact then an enquiry has to be conducted in accordance with Rules and if the absence is established then the employee has to be given an opportunity of

applying for leave and if such application is filed, the same has to be decided in accordance with the M.P. Civil Services (Leave) Rules 1977. The tribunal further contended that it is to be kept in mind that according to Rule 6, leave is not a matter of right. The payment for the period of absence will depend upon the decision on the leave application, if any. In case the employee does not submit any leave application for the period of absence (which has been duly proved) then the consequence of break in service or *dies non* may ensue. Writing these principles, the tribunal further contended that the respondents could perhaps withhold the payment of salary while all these steps are being taken and a decision is taken quickly. They cannot do what they have done in this case just withholding the salary and then sitting back without doing anything further. The tribunal disposed of the case with the direction that the respondents shall take action as indicated above. The enquiry whether the petitioner was absent or not should be completed within 3 months of the receipt of the order by the respondents and if it is found that the petitioner was present for a part of the period, then the salary for that period should be paid immediately. If it is found that the petitioner was absent for the period or some part thereof, then the petitioner shall be given opportunity to submit a leave application within 15 days. If she does not submit any leave application then the respondent shall take a decision about the period of absence. If she submits leave application, decision should be taken on that within a month of

submission of the leave application. If any salary becomes payable to the petitioner as a result of the decision on the leave application, that should be paid immediately.

(3) According to the petitioner, since the authorities did not comply with the order dated 17.08.1999 she filed a contempt petition vide M.A.No.195 of 2000 before the tribunal. The respondents contended in contempt petition that they had tried to contact the petitioner but she was not available at the place of her posting namely Government Ayurvedic Dispensary, Bheji Konta, Distt. Dantewada (C.G). The letters were sent through Regd. Post by them and as the petitioner was not available at the place of her posting, a letter was affixed at the residence of the petitioner. They also submitted that despite all these actions when the petitioner did not turn up nor she submitted any leave application for the period of her absence, then an order dated 03.1.2001 was passed treating the said period of absence as unauthorized and *dies non.* The aforesaid contempt petition was dismissed by the tribunalon 19.3.2001.

(4) Against the said order of tribunal, the petitioner preferred writ petition vide No.662/2001 on the ground that she was not afforded proper opportunity to contest the said contempt petition. The said writ petition was disposed of by this Court vide order dated 06.9.2001 and it was directed that the petitioner may be

allowed to submit counter affidavit/rejoinder and thereafter the matter will be decided within a reasonable time in accordance with law after hearing the parties. It is after all these, the impugned order of termination was passed on 22.10.2003.

(5) The petitioner submits that she could come to know about her termination during the course of hearing of M.C.C.No.28/ 2003.

(6) The petitioner has mainly raised this ground that in fact, both the orders passed by the State authorities have been malafidely passed against her without affording any opportunity of hearing to her. Before passing the order of termination, neither the notices were served upon the petitioner nor she was called upon to file any reply and a direct order of punishment has been passed. About leave case, she stated that in this matter also she was never served by any notice of the authority concerned and the authority proceeded exparte even without service and passed the order of *dies non* against her. This order has been passed in violation of the directions issued by the tribunal to decide the leave case of the petitioner. In fact, both the orders have been passed in complete violation of fundamental principles of natural justice.

(7) Return has been filed on behalf of the respondents. The respondents have denied the contentions of the petitioner. They

have contended that in fact, the petitioner was absent from duty for a very long period and in compliance of the order passed by the tribunal in O.A.No.2420/90, an enquiry was conducted but the petitioner did not turn up to the enquiry and letters/information issued to the petitioner returned unattended. It has been stated vide Para 9 of the return as under:

> *"It is further submitted that as many as three enquiries have been conducted against the petitioner, copies of which are cumulatively annexed herewith as Annexure R-3. Before passing the alleged impugned order Annexure P-1 an enquiry has been conducted and details of enquiry report dated 28.8.1998 and 25.1.2003 are already annexed with the petition."*

(8) Rejoinder to the return has also been filed in which the facts of enquiry have been denied. The service of notice/letters in relation to any enquiry has also been denied by the petitioner. During the pendency of the petition the petitioner filed an application for amendment by which, the facts in relation to the order Annexure P-4 were incorporated. A formal additional return too was again filed on 14.5.2005 but it does not disclose any new fact and it only suggests that an enquiry was conducted and the petitioner was found absent from duty as per the enquiry report, therefore, the impugned order Annexure P-4 was passed against her.

(9) We have heard learned counsel at length and have also perused the records filed by the parties.

(10) First of all, the order of termination is required to be considered. This order is as follows:

"।। कार्यालय जिला आयुर्वेद अधिकारी दक्षिण बस्तर दंतेवाड़ा ।।

क्रमांक/ /स्था0/2003 दंतेवाड़ा, दिनांक–22/10/02

–: आदेश :–

श्रीमति प्रेम कुमारी साहु "दाई" शासकीय आयुर्वेद औषधालय भेजी द्वारा पिछले कई वर्षो से स्वैच्छिक रूप से अनाधिकृत अनुपस्थित रहने, शासकीय मर्यादा के विरूद्ध अशोभनीय पत्र व्यवहार कार्यालयीन एवं शासकीय निदेर्शो का लगातार उल्लंघन करने के कारण तत्काल प्रभाव से इनकी सेवा समाप्त की जाती है ।

जिला आयुर्वेद अधिकारी
दक्षिण बस्तर दन्तेवाड़ा

पृ0क्र0/ /स्था/2003 दन्तेवाड़ा, दिनांक – 22/10/03

प्रतिलिपि :–

1. संचालक, भा0चि0प0 एवं हो0पे0छ0ग0 रायपुर ।
2. कलेक्टर दंतेवाड़ा ।
3. आयुर्वेद चिकित्सा अधिकारी, शासकीय आयुर्वेद औषधालय भेजी ।
4. संबंधित श्रीमति प्रेम कुमारी साहु दाई वर्तमान पता ग्राम पोस्ट जामगांव, जिला कांकेर को सूचनार्थ ।

जिला आयुर्वेद अधिकारी
दक्षिण बस्तर, दन्तेवाड़ा"

(11) The points in consideration are as to whether an enquiry was required to be conducted before passing of the said order ? And if the same was required, it was conducted or not ?

(12) Admittedly, the petitioner was a regular government servant. It is now well settled that Article 311(2) is attracted when a civil servant is reduced in rank or dismissed or removed (which includes his termination) before the normal period of his service and against her will by way of penalty. The expressions used in the order are not conclusive on the question whether it is by way of punishment or not. It is to be determined from the circumstances of the case. The Apex Court has held in the matter of ***Purushottam Lal. Dhingra, Appellant-Vs- Union of India,*** respondent reported in ***AIR 1958 S.C. Pg.36*** that the use of expression "terminate" or "discharge" is not conclusive. Inspite of the use of such innocuous expressions the Court has to apply the two tests namely, (1) whether the servant had a right to the post or the rank or (2) whether he has been visited with evil consequences of forfeiture of benefits already earned. If the case satisfies either of the two tests then it must be held that the servant has been punished and the termination of his service must be taken as a dismissal or removal from service or the reversion so as to attract Article 311(2) of the Constitution of India.

(13) It has further been settled by the apex Court in the matter of ***Moti Ram Deka, Appellant –Vs- General Manager, North East Frontier Railway, Respondents (AIR 1964 S.C. Pg. 600)*** by drawing a distinction between two classes of Government Servants i.e., (1) those who have right to or lean upon the post held by them and (2) those who have no such right. Where a government servant has right to hold the post either according to the contract or the conditions of his service, the mere fact of termination of his service will be deemed to be penal and Article 311(2) will be attracted, whether such termination takes place assigning any reason or not.

(14) It is therefore clear that the service of a Government Servant who is holding a permanent post cannot be terminated substantively prior to the age of superannuation except by way of compulsory retirement according to the rules. If the termination of a Government servant is effected before the age of superannuation and the case is not covered under the exception of compulsory retirement according to the rules, then, the termination of service will *ipso facto* amount to "dismissal" or "removal" irrespective of any penal intention or additional penal consequences being involved because the employee in question had a right to hold the post till the age of superannuation and the deprive of such rights *per-se* constitute a penalty. A right of the government servant to

continue on his post until superannuation or compulsory retirement under the rules can only be taken away in the manner laid down in Article 311(2) of the Constitution.

(15) If we analyze the order of termination with the above background and applying the above principle then it shall be clear that the same is a punishment/penalty in the eye of law. The services of the petitioner have been terminated on the ground that she "unauthorisedly remained absent" for a long period and she has acted in "contravention of directions" of the Government and she has also indulged in "bad correspondence" with the higher authorities. The order itself goes to show that the same has been passed in punitive manner. It creates stigma on the conduct of the petitioner. Moreover, leaving these things apart, admittedly, the petitioner had a right to continue in service till the age of her superannuation. She has not been compulsorily retired by the Government. Therefore, on this ground also in the event of petitioner's case this order could not be passed without conducting an enquiry in which she should have been informed of the charges against her and should have been given a reasonable opportunity of hearing in respect of those charges. In fact, the order of termination of the petitioner amounts to "dismissal" or "removal" from service.

(16) Admittedly the provisions of M.P (C.G) Civil Services (Classification, Control and Appeal) Rules 1966 are applicable in case of the Government Servants. Rule 10 defines the penalties. There are two categories of penalties – (1) minor penalties and (2) major penalties. The removal and dismissal from service have been classified as the major penalties in these rules. They are placed at Serial No.(viii) and (ix). The explanation has been given in this rule which classifies as to what shall not amount to penalty within the meaning of this rule. Explanation (viii) defines about the kind of termination which shall not amount to penalty within the meaning of this rule. The relevant explanations are quoted as under:-

> **Explanation**.- The following shall not amount to a penalty within the meaning of this rule, namely :-
>
> (viii) termination of the services;
>
> (a) of a Government Servant appointed on probation, during or at the end of the period of his probation, in accordance with the terms of his appointment or the rules and orders governing such probation; or
>
> (b) of a temporary Government servant appointed until further orders on the ground that his services are no longer required; or
>
> (c) of a Government servant, employed under an agreement, in accordance with the terms of such agreement.
>
> (Only relevant portion of Explanation to Rule 10 quoted)

(17) Admittedly, the termination of the petitioner is not covered under any of the explanations enumerated vide Clause (viii) as above. As has already been held by us that the aforesaid termination amounts to "dismissal" or "removal", which is a major penalty for which an enquiry is required under Rule 14 of C.C.A. Rules 1966. Rule 14 prescribes the procedure for imposing major penalties. In fact, this is a complete procedure based on principles of natural justice and no major penalty can be imposed on the Government Servant without following these procedures and without conducting an enquiry in accordance with the same.

(18) On the basis of the above facts and circumstances it appears to us that in fact, a complete departmental enquiry was required to be conducted before imposing the aforesaid penalty against the petitioner and if the enquiry has not been conducted, then, the impugned order cannot be sustained in the eye of law. We are fortified in our views by the decision reported in ***1982 JLJ Note 84 (Chhotelal –vs- State of M.P)*** which goes to show that the provisions regarding imposing of penalties prescribed under the rule are mandatory in nature and non-compliance of them is fatal. In this way we hold that in the present case a complete departmental enquiry was required to be conducted and then only the impugned order could have been passed as the impugned order though termed as 'termination' is in fact an order of dismissal or removal from service.

(19) Now coming to the second question about the fact as to whether the enquiry was conducted or not ? As referred to above, it has been mentioned in Para-9 of the return that 3 enquiries were conducted against the petitioner and the document Annexure R-3 has been filed. Two enquiry reports dated 28.8.1998 and 25.1.2003 are referred to therein. We have perused the reports. Report dated 28.8.1998 is at Pg.153 to 163. The other report dated 25.1.2003 is at Page 137. A bare perusal of these documents go to show that these are the reports in relation to enquiry about absence from duty. It appears that document dated 25.1.2003 is a comment of one Rajendra Parasar, A.M.O., and the enquiry report dt.28.8.1998 is a report of the general enquiry of the dispensary given by Ayurvedic Chikitsa Adhikari. These are not the enquiry reports or the documents of enquiry pertaining to the removal of the petitioner. Learned deputy advocate general appearing on behalf of the State submitted that these are the only documents in relation to enquiry conducted. Even no note sheets or other documents have been shown which may go to suggest that an enquiry before removal of the petitioner was conducted and the same was conducted under rule 14 of the aforesaid Rules. A bare perusal of Annexure R-3 dated 26.12.2003 goes to show that the same is a letter which in fact is related with the case of absence of the petitioner in which a request has been made by the higher authority that the documents may be taken, enquiry should be

conducted and the report should be submitted. This cannot be co-related with the removal. In this manner, we are convinced that in fact, no enquiry was initiated or conducted before passing of the impugned order dated 22.10.2001 (Annexure P-1) and it has been passed in utmost violation of fundamental principles of natural justice and also in violation of mandatory provisions of rule 14 of C.C.A. Rules 1966. In the opinion of this Court, this case is a matter of gross violation of principles of natural justice and the order Annexure P-1 deserves to be quashed.

(20) Now coming to the next question about the impugned order dated 03.1.2001 (Annexure P-4) which is in relation to leave case of the petitioner. The documents which have been filed to defend this order are copies of various letters shown to have been issued to the petitioner, but the fact remains that the petitioner was unserved. It has not come on record as to what action was taken by the authorities of the State to comply with the order of State Administrative Tribunal dated 17.8.1999 (Annexure P-3) in which various directions were issued as to how the leave case of the petitioner will be decided. The document dated 28.8.1998 cannot be related with the leave matter as it is not a document after passing of the order of the SAT. None of the documents go to show as to how the enquiry in relation to the leave case was conducted and how the authorities came to the conclusion that the petitioner remained absent in the relevant period. There appears to be non

compliance of the directions issued by the Tribunal and the order dated 3.1.2001 (Annexure P-4) is indefensible in the eye of law. This short order of 3 lines seems to have been passed without giving any opportunity of hearing to the petitioner as per the directions of the SAT. Even the order has not been communicated to the petitioner. The same was not endorsed to the petitioner. In fact, this is the reason for which this order was not challenged at the initial stage by the petitioner and the challenge was made at the latter stage by way of amendment referred to above. Needless to say that this order has been passed without following proper procedure in accordance with the directions issued by the tribunal in O.A.No.2420/1990 and if the petitioner has not been given any opportunity to establish her case as directed by the tribunal, then, the order cannot be sustained and the same is liable to be quashed.

(21) In the result, the petition is allowed. The impugned order of termination dated 22.10.2003 (Annexure P-1) and the order dated 03.01.2001 (Annexure P-4) passed in leave case are quashed. The consequence of quashing of termination will follow. It is stated that the date of superannuation of the petitioner was 30.10.2003. As a result of quashment of the order Annexure P-1, the petitioner shall be treated to be superannuated on 30.10.2003 as a normal retirement. She will be entitled to all consequential benefits pertaining to the pay and allowances as if her services were not

terminated by the impugned order except the pay pertaining to the period from 07.1.1989 to 08.1.1990 for which the State will take a decision within a period of 3 months from today by following the directions issued by the tribunal in O.A.No.2420/1990 on 17.8.1999. The retrial benefits of the petitioner and her arrears of salary and allowances except the salary for the period in dispute i.e., from7.1.1989 to 08.1.1990 shall be paid to her and shall not be delayed on the ground of pendency of the leave case with the department. The normal retrial dues and arrears of salary due as above shall be paid to her within 3 months from today as she is not getting salary since long back. The consequence of the result of the leave case will take its own course.

(22) Before parting with the judgment, we must appreciate the services rendered by Smt.Meera Jaiswal who appeared as Amicus Curiae and assisted the Court in this case to the best of her ability. A copy of this order be placed in the records of M.C.C.28/2003.

Sd/-
Acting Chief Justice

Sd/-
Sunil Kumar Sinha
Judge

11.03.2005

/Rao/